IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA KHALIL,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
ROHM AND HAAS COMPANY,	**:**	
Defendant	**:**	**NO. 05-3396**

MEMORANDUM AND ORDER

PRATTER, J. FEBRUARY 11, 2008

Sandra Khalil sued her former employer, Rohm and Haas Company, pursuant to Title I of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S.A. § 955, for damages arising from alleged discrimination, retaliation and disclosure of confidential medical information. Specifically, Ms. Khalil alleges (1) disability discrimination in the form of imposition of a mandatory restriction without dialogue, failure to accommodate, and discriminatory discharge (Count I); (2) retaliatory discharge (Count II); and (3) disclosure of confidential medical information in violation of the ADA (Count III).

Rohm and Haas moves for summary judgment on the discrimination and retaliation claims on the grounds that there is no evidence that (1) Ms. Khalil is disabled or regarded as disabled within the meaning of the ADA; (2) Rohm and Haas failed to accommodate or otherwise discriminated against Ms. Khalil; and (3) the performance-based reasons for Ms. Khalil's discharge were pretextual. Rohm and Haas moves for summary judgment on the medical information claim on the grounds that there was no disclosure of any *ADA-protected*

medical information and there is no evidence of damages. Ms. Khalil opposes the Motion as to the discrimination and retaliation charges, but is no longer pursuing a claim based on the alleged disclosure of confidential medical information (see Tr. 1/25/08 at 5).

For the reasons discussed more fully below and after carefully studying and considering the fine presentations – both orally and in the written briefs – of both parties' counsel, with respect to the discrimination and retaliation claims, the Court will grant in part and deny in part the Motion as outlined in this Memorandum. With respect to the disclosure claim, the Court will grant the Motion as unopposed.

FACTUAL BACKGROUND

The following facts are undisputed.

Ms. Khalil was employed by Rohm and Haas from June 11, 2001 until September 2002 as a chemical engineer. (Defendant's Statement of Undisputed Facts and Plaintiff's Response ("Facts") ¶ 1.) In June 2001, Dr. David Bonner, the former Director of Global Technology for Rohm and Haas's Spring House, Pennsylvania facility, hired Ms. Khalil as a Senior Engineer in the rotational engineering program. (Id. at ¶¶ 4, 6.) Dr. Bonner was responsible for the rotational program overall, but day-to-day supervision was handled by the manager in charge of each specific assignment, or by Al Brown, the head of the rotational department. (Id.)

Ms. Khalil worked on various assignments from June 2001 through mid-July 2002 under the general supervision of Dr. Bonner. In May 2002, Dr. Bonner assigned Ms. Khalil to work for Dr. Catherine Hunt in External Funding, the department responsible for matching outside grant sources to fund Rohm and Haas research projects. (Id. at ¶¶ 8, 9.) While Dr. Bonner remained Ms. Khalil's supervisor, he viewed Dr. Hunt as the person responsible for assigning Ms. Khalil

work and as having final authority for such assignments. (Id. at 9.) On July 13, 2002, Dr. Bonner voluntarily ended his employment at Rohm and Haas. (Id. at ¶ 7.) Following Dr. Bonner's departure, Dr. Hunt assumed responsibility for External Funding. (Id. at ¶ 8.)

On July 9, 2002, Ms. Khalil had a significant respiratory reaction to paint fumes while her office area was being painted. (Id. ¶ 53.) Following that reaction, the Rohm and Haas Nurse Manager wrote that Ms. Khalil "should avoid areas being painted." (Id.) On the same document, the Nurse Manager checked the box indicating that Ms. Khalil had "no job-relevant medical impairment," and did not write any job restrictions for Ms. Khalil. (Id.) Based on the Nurse Manager's assessment, Dr. Hunt arranged for Ms. Khalil to work from a temporary office at the other end of the hall until all office renovations were completed. (Id.)

The paint fumes did not dissipate until August 2002. (Khalil Dep. 104-05.) Ms. Khalil returned to her office in mid-August, by which time the paint fumes had gone away. (Khalil Dep. 299.) It is undisputed that while she was in the temporary office, Ms. Khalil had access to her computer and, at Ms. Khalil's request, Dr. Hunt and an administrative assistant brought materials from Ms. Khalil's regular office to the temporary office. (Facts ¶ 55.) Ms. Khalil cannot identify any specific files or documents that she did not have while in the temporary office, but she maintains nonetheless that she did not have the materials she needed to do her job. (Khalil Dep. 297.) Nevertheless, Ms. Khalil does not believe that her move to the temporary office caused her to perform unsatisfactorily because despite working with "limited ability" due to the location of the temporary office, she "did the best [she] could" and "delivered on what [Dr. Hunt] asked to the best of [her] ability." (Khalil Dep. 301-02.)

Resting upon the decision of Dr. Hunt, Rohm and Haas formally terminated Ms. Khalil's

employment on September 27, 2002. (Khalil Dep. 28; Bowie Affidavit ¶ 7.)

PROCEDURAL HISTORY

On August 30, 2002, Ms. Khalil filed an administrative complaint of disability discrimination against Rohm and Haas with the Pennsylvania Human Relations Commission ("PHRC"). (Facts ¶ 89.) The PHRC complaint was dual-filed with the Equal Employment Opportunity Commission ("EEOC"). (Id.) In connection with Ms. Khalil's administrative claim, Ms. Khalil's treating doctor, Dr. G. Chris Christensen, III, D.O., completed a PHRC "request for medical verification" form on behalf of Ms. Khalil. (Id. at ¶ 61.) In the PHRC form, Dr. Christensen did not identify Ms. Khalil's condition as "asthma," but instead wrote a diagnosis of "possible reactive airway disease," and answered "No" to the question, "Does the individual's medical condition or impairment substantially limit one or more major life activities? The list of major life activities includes . . . breathing . . . and working." (Id.)

In its findings regarding Ms. Khalil's complaints, the PHRC relied on Dr. Christensen's statement to conclude that Ms. Khalil "is not a member of the protected class," and that any "impairment does not substantially limit one or more major life activities." (Khalil Dep. 38-39, ex. 7.) In those same findings, the PHRC concluded that Ms. Khalil had presented no evidence to support a "regarded as disabled" claim. (Id. at ex. 7.) The PHRC dismissed Ms. Khalil's complaints, and the EEOC adopted the PHRC's findings. (Id. at 38-40.)

On October 31, 2002, Ms. Khalil filed a Pennsylvania workers' compensation claim petition against Rohm and Haas, alleging asthma as an occupational injury developed during Ms. Khalil's tenure at Rohm and Haas. (Facts ¶ 113; Khalil Dep. 6-7, 350-51, ex. 3.) In the proceedings before the Pennsylvania Workers' Compensation Judge ("WCJ") and the

Pennsylvania Workers' Compensation Appeal Board, Ms. Khalil was represented by a lawyer who specializes in workers' compensation. (Facts ¶ 113.) In addition to submitting a brief, Ms. Khalil testified before the WCJ, and also submitted supplemental deposition testimony in support of her claim petition. (Id.) Rohm and Haas presented testimony from Dr. Hunt and other witnesses. (Id.)

On January 13, 2005, the WCJ denied Ms. Khalil's claim petition. In the "Findings of Fact," the WCJ opined on Ms. Khalil's tenure at Rohm and Haas and the reasons for her dismissal, concluding that "[Ms. Khalil] was terminated for reasons entirely unrelated to any physical disability." (Khalil Dep. ex. 3.) The WCJ also concluded that Ms. Khalil had "failed to meet her burden to establish that she suffered a work-related injury while working for [Rohm and Haas]." (Khalil Dep. ex. 3 at 8.) Ms. Khalil appealed the WCJ decision to the Pennsylvania Workers' Compensation Appeal Board, and the Board denied the appeal. (Khalil Dep. 22-23, Ex. 4.) Ms. Khalil then appealed the Appeal Board decision to the Pennsylvania Commonwealth Court, which affirmed the WCJ decision. (Khalil Dep. 23; Ex. L.)

Ms. Khalil subsequently filed this suit on July 1, 2005. By Order of November 17, 2005, the Court (Green, J.) granted Rohm and Haas's Motion to Dismiss Count IV (invasion of privacy) and Count VI (wrongful discharge), and struck Plaintiff's request for punitive damages under Count V (the PHRA claim). Following Judge Green's passing, the case was reassigned to this Court. After a lengthy period of discovery, Rohm and Haas filed the present Motion for Summary Judgment as to Ms. Khalil's remaining claims.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the Court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case," id. at 325, or by offering affirmative evidence which demonstrates that the plaintiff cannot prove his case, Lawrence v. Nat'l Westminister Bank N.J., 98 F.3d 61, 69 (3d Cir. 1996). After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The evidence provided by the nonmovant is to be believed, and the Court must draw all reasonable and justifiable inferences in the nonmovant's favor, Anderson, 477 U.S. at 255, and resolve all "doubts and issues of credibility against the moving party," Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). At the summary judgment stage, the Court's function "is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Brooks v. Kyler, 204 F.3d 102, 105 n.5 (3d Cir.

2000).

The party opposing summary judgment must support each essential element of that party's opposition with concrete evidence in the record. Celotex, 477 U.S. at 322-23. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). This requirement upholds the "underlying purpose of summary judgment [which] is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." Walden v. Saint Gobain Corp., 323 F. Supp. 2d 637, 642 (E.D. Pa. 2004) (citing Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976)).

DISCUSSION

I. Issue Preclusion (Collateral Estoppel)

Rohm and Haas asserts that the findings in the workers' compensation litigation preclude Ms. Khalil's discriminatory discharge and retaliatory discharge claims here because the Workers' Compensation Appeal Board found that Ms. Khalil was discharged for performance reasons, and that finding was affirmed by the Pennsylvania Commonwealth Court.

The doctrine of collateral estoppel, or, as the doctrine is now more frequently known, issue preclusion, forecloses "re-litigation in a later action . . . of an issue of fact or law which was actually litigated and which was necessary to the original judgment." Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 548 (3d Cir. 1996) (citations omitted). As our Court of Appeals explained, "[i]ssue preclusion embodies the principle that later courts should honor the first actual decision of a matter that has been actually litigated." Rider v. Commonwealth, 850 F.2d 982, 989 (3d Cir. 1988) (citation omitted). Issue preclusion applies if the following four

elements are satisfied: (1) the issue decided in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in a prior action. Dici, 91 F.3d at 548. The party asserting preclusion bears the burden of proving its applicability. Id.

Under the doctrine of issue preclusion, an issue of fact or law that was previously determined by a court of competent jurisdiction may not be disputed in a subsequent suit between the same parties or their privies. Montana v. United States, 440 U.S. 147, 153 (1979). Federal law requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged. Kremer v. Chemical Construction Corp., 456 U.S. 461, 479-80 (1982) (holding that under 28 U.S.C. § 1738, a federal court in a Title VII action should grant preclusive effect to a state court decision upholding a state administrative agency determination when the state court's decision would be barred by issue preclusion in subsequent actions in that state's own courts); see also Dici, 91 F.3d at 548-49.

It is possible for litigation such as that which predated the present suit to have preclusive effect. The Pennsylvania Superior Court has held that "[p]rinciples of collateral estoppel apply to judgments of the Workmen's Compensation Appeal Board." Capobianchi v. BIC Corp., 666 A.2d 344, 348 (Pa. Super. 1995). In Capobianchi, the litigated workers' compensation finding that the plaintiff's degenerative neck condition was not a work-related injury was given collateral estoppel effect in a subsequent products liability case alleging that the injury occurred while the

plaintiff was at work. The legal consequence of the application of collateral estoppel was a summary judgment dismissal of the products liability lawsuit. Id.

In Jones v. United Parcel Service, 214 F.3d 402 (3d Cir. 2000), the Court of Appeals for the Third Circuit likewise held that the findings in a Pennsylvania workers' compensation proceeding adverse to the plaintiff had collateral estoppel effect in the plaintiff's later ADA lawsuit. As that court explained,

> We predict that the Pennsylvania Supreme Court would follow its decision in Rue under the circumstances here and would give preclusive effect to the factual finding of the WCJ in the workers' compensation proceeding that [plaintiff] was fully recovered from his work-related injury, regardless of the differing policies behind the ADA and the Workers' Compensation Act. As this prior proceeding resulted in a final judgment, to which [plaintiff] litigated it through the Pennsylvania courts, [plaintiff] is barred by Pennsylvania's doctrine of collateral estoppel from challenging this factual finding in his ADA claim. We are therefore required by 28 U.S.C. § 1738 to consider [plaintiff's] ADA claim in light of the irrefutable fact that as of December 1990 [plaintiff] had fully recovered from his work-related injury and was able to return to his position as a package car driver.

Jones, 214 F.3d at 406.

Before considering here the potential role for the doctrine of issue preclusion, it bears mention that many courts have emphasized another prerequisite. That is, in addition to the four elements stated above, courts have found that the determination of whether issue preclusion applies also depends upon "what was actually raised and decided at the prior proceeding, and whether the adjudicator confronted and decided the question or merely remarked on it in dicta." Abdulhay v. Bethlehem Medical Arts, 425 F. Supp. 2d 646, 656 (E.D. Pa. 2006) (stating fifth element of collateral estoppel as requirement that "the determination in the prior proceeding was

essential to the judgment"). See also Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency, 126 F.3d 461, 465 (3d Cir. 1997) (holding that because prior judge's findings were clear dicta, they could not support the application of collateral estoppel); Tobler v. Verizon, 2005 U.S. Dist. LEXIS 14138, at *13-14 (E.D. Pa. July 13, 2005) (holding that even though an arbitrator had previously determined that plaintiff had been discharged for cause, such determination was not entitled to collateral estoppel effect in a subsequent ERISA proceeding because the reasons for the termination were not essential to the outcome of the arbitration); In re Access Beyond Technologies, Inc., 237 B.R. 32, at *20-21 (Bkrtcy. D. Del. 1999) ("Dicta is not covered by the doctrine of collateral estoppel because [collateral estoppel] requires that the conclusion sought to be given preclusive effect actually formed a necessary part of the ultimate determination reached by the first court."). The wisdom of this additional concept is compelling here.

In this case, issue preclusion does not bar Ms. Khalil's claims because the reason for Ms. Khalil's discharge was not actually at issue in the prior workers' compensation proceedings and was not "necessary to the original judgment." See Dici, 91 F.3d at 548.

In its decision denying Ms. Khalil's claim, the WCJ "found" that "[Ms. Khalil] was terminated for reasons entirely unrelated to any physical disability." (Khalil Dep. ex. 3.) The WCJ also concluded that Ms. Khalil had "failed to meet her burden to establish that she suffered a work-related injury while working for [Rohm and Haas]." (Id. at 8.) The Pennsylvania Workers' Compensation Appeal Board denied Ms. Khalil's appeal (id. 22-23, ex. 4), and the Pennsylvania Commonwealth Court subsequently affirmed the WCJ decision (id. 23; Ex. L).

Ms. Khalil contends that the WJC's comments as to the reasons for her discharge are merely dicta and do not carry any preclusive effect. Indeed, asserts Ms. Khalil, in the brief

submitted to the WCJ, Rohm and Haas identified the sole issue then at hand as "WAS CLAIMANT'S DISABILITY UNRELATED TO WORKPLACE EXPOSURE TO CARBON BLACK ON NOVEMBER 29, 2001, OR PAINT FUMES ON JULY 9, 2002, SUCH THAT THE CLAIM PETITION SHOULD BE DENIED?" (Pl. Response Ex. N.)

Rohm and Haas responds that a determination of the reason for Ms. Khalil's discharge was necessary to the ultimate decision because disability benefits are not payable where a claimant is terminated for cause. In affirming the decision of the WCJ, the Pennsylvania Commonwealth Court explained,

> [t]he WCJ found that the Claimant was terminated due to performance issues, not because of a work injury. *Where a claimant is terminated for cause, disability benefits are not payable.* Thus, the WCJ did not err in denying Claimant's claim petition *because* Claimant was terminated for cause.

(Def. Mot. Ex. L at 5 (emphasis added) (citation omitted).) Rohm and Haas asserts that the causal language cited above relating the reason for Ms. Khalil's discharge to the denial of her claim establishes that the findings regarding Ms. Khalil's discharge were central to the dismissal of the claim.

A close review of the Commonwealth Court's decision shows that the findings concerning the reason for Ms. Khalil's discharge were not necessary to the ultimate determination in the workers' compensation proceedings. As the Commonwealth Court explains, "[i]n a claim petition for compensation, the claimant has the burden of establishing the right to compensation and all of the elements necessary to support an award, including the burden of establishing a causal relationship between a work-related incident and an alleged disability." (Def. Mot. Ex. L at 4.) Noting that the WCJ "chose to discredit the testimony of Claimant," the

Commonwealth Court "conclude[d] that without Claimant's testimony and her medical expert's testimony, there is no other evidence to support Claimant's alleged work injury." (Id. at 4-5.) In affirming the WCJ's denial of the claim, the Commonwealth Court focused almost exclusively on the absence of evidence of a causal connection. (See id. at 7.)

In contrast to Jones, where the issue of the plaintiff's physical status was directly at issue in the prior proceeding, here the only issue before the WCJ was whether Ms. Khalil had suffered a work-related injury. The passage regarding disability benefits quoted above is merely dicta, indicating that *even if* Ms. Khalil had demonstrated a causal connection between a work-related incident and the alleged injury, disability benefits would not be available because the WCJ determined that she was terminated for cause. (See id. at 5.) However, the WCJ did not need to reach the issue of what prompted her discharge because he clearly determined the predicate, i.e., that there was insufficient evidence to establish a causal connection between an alleged injury and an alleged work-related incident. Thus, the earlier judicial pronouncements regarding Ms. Khalil's discharge were not necessary to the ultimate determination of the workers' compensation proceedings. Therefore, issue preclusion does not bar Ms. Khalil's retaliation and discriminatory discharge claims here.

II. Disability Discrimination Claims (Counts I and V)[1]

The ADA prohibits employers from discriminating "against a qualified individual with a

[1] Ms. Khalil's PHRA claim (Count V) parallels the ADA disability discrimination claim (Count I) and the ADA retaliatory discharge claim (Count II). Since the PHRA is interpreted "in accord with its federal counterparts" and since "the PHRA definition of 'handicap or disability' is substantially similar to the definition of 'disability' under the PHRA," the legal analysis of Ms. Khalil's ADA claims applies with equal force to the PHRA claims. See Kelly v. Drexel U., 94 F.3d 102, 105 (3d Cir. 1996) (citations omitted).

disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

The burden-shifting scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies to discrimination claims under the ADA and the PHRA. Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). The plaintiff bears the initial burden of establishing a *prima facie* case by a preponderance of the evidence. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to produce evidence that the adverse employment action was taken for a legitimate, non-discriminatory reason. McDonnell Douglas, 411 U.S. at 802. If the employer succeeds, the burden then shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the employer's proffered reason was merely pretext. Id. at 804; Tex Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

A. *Prima Facie* Case

To establish a *prima facie* case of discrimination, a plaintiff must demonstrate that (1) she is a disabled person within the meaning of the ADA; (2) she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation by the employer; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999). To avoid summary judgment, the evidence must be sufficient "to convince a reasonable factfinder to find all of the elements of the *prima facie* case." Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); see also St. Mary's Honor Ctr.,

509 U.S. at 506.

Here, it is undisputed that Ms. Khalil was qualified to perform the essential functions of the job. As discussed below, whether there is adequate evidence to establish the first and third prongs are very close questions, but for the reasons explained below the Court concludes that Ms. Khalil has proffered minimally sufficient evidence to establish a *prima facie* case.

1. Disability Within the Meaning of the ADA

"Disability," with respect to an individual, is defined under the ADA as

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarding as having such an impairment.

42 U.S.C. § 12102(2). Thus, to establish that she has a disability within the meaning of the ADA, Ms. Khalil must show: (1) that she has a physical or mental impairment that substantially limits one or more of her major life activities; (2) that she has a record of such impairment; or (3) that she was "regarded as" having such an impairment by Rohm and Haas. See Marinelli v. City of Erie, 216 F.3d 354, 359 (3d Cir. 2000) (applying § 12102(2)). The determination of whether a disability exists should be made "on a case-by-case basis." Albertsons, Inc. v. Kirkburg, 527 U.S. 555, 556 (1999). Indeed, "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999) (quoting 29 C.F.R. § 1630.2(j)). Here, Ms. Khalil asserts she is "disabled" for purposes of the ADA under all three prongs of the ADA definition.

a. Impairment that Substantially Limits a Major Life Activity

According to the EEOC regulations, "major life activities" for purposes of the ADA include, but are not limited to, basic functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). Here, Ms. Khalil contends that she suffers from asthma, and alleges that as a result she is substantially limited in the major life activity of breathing. (Tr. 1/25/08 at 25.)[2]

The "substantial limitation" requirement means that an individual with an ADA "disability" must be "unable to perform a major life activity that the average person in the general population can perform," or must be "significantly restricted as to the condition, manner or duration under which, [the] individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1603.2(j)(1)(i)-(ii). To determine whether an impairment substantially limits a major life activity, the EEOC has directed courts to consider: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2)(i)-(iii). As the Court and both parties' counsel observed during oral argument, the issue is at least a mixed question of fact and law, if not entirely a factual one. (Tr. 1/25/08 at 6,7, 26, 34.) See Bower v. Federal Express Corp., 2007 WL 1181019, at *1 (E.D. Pa. Apr. 19, 2007) (slip op.) (treating issue of "disability" within the meaning of the ADA as a question of fact).

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[2] At oral argument, Plaintiff's counsel represented to the Court that Ms. Khalil does not allege a substantial limitation in the major life activity of *working*. (Tr. 1/25/08 at 25-26.) Therefore, the only major life activity at issue in this case is breathing.

As a result of the "substantial limitation" requirement, a diagnosis alone is not sufficient to establish an ADA disability. Tice v. Centre Area Transp. Authority, 247 F.3d 506, 513 n.5 (3d Cir. 2001). The ADA requires plaintiffs to submit not only evidence of a medical diagnosis, but to "offer[] evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial." Toyota Motor. Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002). However, an ADA plaintiff need not experience symptoms of an impairment every day to establish that her impairment is substantially limiting. Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002); see also Jackson v. Wal-Mart Stores, 2007 WL 1041027, at *10 (W.D. Pa. Apr. 5, 2007) (finding sufficient evidence in the record from which a jury reasonably could conclude that plaintiff is substantially limited in the major life activity of breathing even though plaintiff did not have daily asthma attacks).

In addition, a determination as to whether an individual is disabled "should be made in reference to any measures that mitigate the individual's impairment." Gallagher v. Sunrise Assisted Living, 268 F. Supp. 2d 436, 440 (E.D. Pa. 2003) (citing Sutton, 527 U.S. at 482-83). Consequently, "a person whose physical or mental impairment is corrected by medication or other mitigating measures cannot be considered to have an impairment that substantially limits a major life activity." Id. (citing Sutton, 527 U.S. at 482-83).

With respect to the major life activity of *breathing*, under certain circumstances, courts have held that asthma can be sufficiently severe to raise a genuine issue of fact as to whether the plaintiff is disabled within the meaning of the ADA. For example, in Bower, 2007 WL 1181019, the court denied summary judgment on the grounds that "[g]enuine issues of material fact presently exist in this action such that a jury must decide them . . . [such as] the contested

threshold question of whether [plaintiff's] asthma is severe enough to render her 'disabled' as defined by the ADA . . . ." Id. at *1. In that case, the plaintiff took one month of leave due to her asthma. Id.

Similarly, in Schmidt v. Mercy Hospital, 2007 WL 2683826 (W.D. Pa. Sept. 7, 2007), where the plaintiff's asthma involved a "severe degree of airway obstruction" and "alarming peak flow measurements," and the plaintiff's treating physician testified as to the long-term nature of the plaintiff's condition, the court found sufficient evidence of a disability. Id. at *2. See also Jackson, 2007 WL 1041027, at *10 (finding sufficient evidence in the record from which a jury reasonably could conclude that plaintiff is substantially limited in the major life activity of breathing where plaintiff had to take asthma medication daily, became out of breath and without the ability to speak, could not control the asthma attacks when they occurred, and occasionally needed additional medical care in order to breathe properly).

However, under different fact patterns, courts have held that allergies or asthma were not so severe as to substantially limit any major life activity, including breathing. In Gallagher, the court held that the plaintiff was not disabled for purposes of the ADA where the plaintiff's allergies caused "coughing, watering of the eyes and unspecified breathing difficulties." 268 F. Supp. 2d at 441. Noting that there was "no evidence" that the plaintiff's physical allergic reaction was "so debilitating it limited Plaintiff's ability to hold a conversation or move about freely," and that the plaintiff had "offered no evidence of the permanent or long term impact of the allergies," the court held that "[t]he evidence on record does not demonstrate an individual unable to breathe or significantly restricted in her ability to breathe." Id. The court also took into consideration the plaintiff's use of an inhaler and injections, corrective measures which

"decreased any limitation Plaintiff's allergies placed on her breathing." Id.; see also Claycomb v. Playtex Prods., Inc., 2007 WL 1794150 (D. Del. June 19, 2007) (granting summary judgment where employer's occupational health physician determined that plaintiff did not suffer from any substantial limitation due to her asthma and plaintiff did not offer any medical evidence in rebuttal).

On the factual record presented to the Court here, and accepting that the issue is primarily a factual one, there is sufficient evidence from which a jury conceivably could conclude that Ms. Khalil is "disabled" for ADA purposes under the first prong. In other words, there is a genuine issue of fact as to whether Ms. Khalil's asthma – with or without resort to an inhaler – substantially limits her in the major life activity of breathing. The dispute results from the following facts from the record:

Ms. Khalil's treating doctor, Dr. Christensen, whom she saw from February 2002 through December 2002, diagnosed Ms. Khail with asthma in February or March of 2002. (Facts ¶ 59.) From February 18, 2002 through the end of 2002, Dr. Christensen prescribed only Combivent, a rescue inhaler to be used if Ms. Khalil's airway closes, for Ms. Khalil's asthma/breathing issues. (Facts ¶ 62.) Previously, however, Advair was prescribed for Ms. Khalil, and she took that medication on a regular basis. (Id. at 115.) In 2002, Ms. Khalil's only appointments with Dr. Christensen were on February 18, 2002 and March 26, 2002. (Id. at ¶ 59.)

Ms. Khalil contends that her asthma causes tightness in her chest, breathing difficulties, mucus in her chest, and a cough. (Khalil Dep. 102-04, 106.) According to Ms. Khalil, her asthma makes it difficult for her to go into the city, eat in smoky restaurants, or drive with the windows down. (Id.) She experiences "flare-ups" when exposed to fumes such as car fumes or

household chemicals. By the same token, however, in 2002 Ms. Khalil nonetheless was able to participate in a range of outdoor and presumably fume-sensitive activities, including travel in Egypt and California, driving to and from work every day, eating in restaurants, and performing household cleaning. (Facts ¶¶ 63, 66.) While at Rohm and Haas, Ms. Khalil does not remember ever missing a full day of work because of her asthma or breathing problems. (Id. at ¶ 64.)

In 2002, Ms. Khalil experienced "attacks" – that is, chest tightening – in February or March, and then again on one day in July and one day in August. (Facts ¶ 63.) The episode in July was related to the paint fumes, and the chest tightening loosened up as soon as Ms. Khalil left the area being painted. (Id.) Ms. Khalil did not see Dr. Christensen in connection with either the July or August 2002 incidents of chest tightening. (Id.) However, at least one of these reactions required the use of the rescue inhaler. (Khalil Dep. 111-12; Facts ¶ 62.)

On August 30, 2002, Ms. Khalil submitted to the Rohm and Haas Medical Department a note from Dr. Christensen stating: "Sandra is under our care for asthma. She is fume sensitive." (Id. at ¶ 60.) The note did not contain any additional information on Ms. Khalil's condition or present any restrictions for Ms. Khalil's work. (Id.) In connection with her PHRC charge of discrimination against Rohm and Haas, Dr. Christensen completed a PHRC "request for medical verification" form on behalf of Ms. Khalil. (Id. at ¶ 61.) In the PHRC form, Dr. Christensen did not identify Ms. Khalil's condition as asthma, but instead wrote a diagnosis of "possible reactive airway disease," and answered "No" to the question, "Does the individual's medical condition or impairment substantially limit one or more major life activities? The list of major life activities includes . . . breathing . . . and working." (Id.)

The Rohm and Haas medical staff also found that Ms. Khalil was not substantially

limited in any major life activity. On January 4, 2002, the Rohm and Haas Medical Department performed a spirometry test (i.e., a test of pulmonary function) on Ms. Khalil, and the "testing indictate[d] normal spirometry." (Facts ¶ 68.) However, the Medical Department did not perform any spirometry test on Ms. Khalil after January 4, 2002. (Id.) Following the July 2002 paint reaction, the Rohm and Haas Nurse Manager assessed Ms. Khalil and reported that Ms. Khalil "should avoid areas being painted," but otherwise had "no job-relevant medical impairment." (Id.)

To summarize, Ms. Khalil describes her symptoms as occasional chest tightening, coughing with mucus, and wheezing. She does not take medication unless she has an attack. In 2002, Ms. Khalil experienced "attacks" (chest tightening) on three occasions, and she saw her doctor twice in 2002 for breathing-related issues. Ms. Khalil cannot predict when an attack will occur, and on at least one occasion had to leave work due to an attack. While no medical professional has determined that Ms. Khalil is substantially limited in a major life activity, her treating doctor opined that she has asthma and/or "possible reactive airway disease." Although this evidence certainly is not overwhelming, and if, indeed, it develops that her condition is one that only presents itself as an occasional "flare-up" then her condition may fall short of being a substantial impairment, the Court concludes on this record at this time that a reasonable jury possibly could find that Ms. Khalil's asthma substantially limits her in the major life activity of breathing.

b. Record of Disability

Under clause (B) of § 12102(2), a person is a qualified individual with a disability if that person "has a history of, or has been misclassified as having, a mental or physical impairment

that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). The record indicating that the plaintiff has or had a substantially limiting impairment must be a record relied upon by the employer in making the employment decision. 29 C.F.R. § 1630.2(k); Tice, 247 F.3d at 513. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. 29 C.F.R. Pt. 1630, App. § 1630.2(k).

Ms. Khalil asserts that she had a "record of disability" because she "had treated with both Dr. Scott and Dr. Christensen for asthma, had notified Defendant of her asthma, and had provided a medical release allowing Defendant to obtain her medical records . . . ." (See Pl. Response 21-22).[3] Dr. Hunt was a member of the team that investigated the July 2002 paint fume incident, and was responsible for assigning Ms. Khalil to the temporary office. Ms. Khalil voluntarily disclosed her asthma to the investigation team, but Dr. Hunt's report concluded, "there is no information in the employee's medical file to indicate that she has asthma." (Khalil Dep. 184, 274, 331, ex. 23 at 2-3.) In response to that incident, the Rohm and Haas Nurse Manager wrote that Ms. Khalil "should avoid areas being painted." (Id.)

Ms. Khalil also signed a release for medical records from her previous treating physician, Dr. Scott, and submitted it to Rohm and Haas on July 19, 2002. (Pl. Response Ex. I.) Rohm and Haas staff doctor Jeffrey Erinoff received this release on July 19, 2002, but did not take any steps to determine whether Ms. Khalil needed any workplace restrictions. (Erinoff Dep. 76.) Dr.

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[3] On August 30, 2002, Ms. Khalil also submitted to the Rohm and Haas Medical Department the note from Dr. Christensen stating: "Sandra is under our care for asthma. She is fume sensitive." (Id. at ¶ 60.) However, it is undisputed that prior to Ms.Khalil's termination, Dr. Hunt was not aware of this note and, therefore, it cannot be considered part of any "record" of disability in this case. (Hunt Aff. ¶ 11; Khalil Dep. 77.)

Erinoff never diagnosed Ms. Khalil with asthma (Def. Mot. Ex. 18), and never told Ms. Khalil that he had diagnosed her with asthma (Khalil Dep. 128; Erinoff Dep. 93; Erinoff Aff. ¶ 8).

The Court concludes that there is insufficient evidence to establish a "record" of Ms. Khalil's alleged impairment and, therefore, there is insufficient evidence to establish that Ms. Khalil was "disabled" within the meaning of section 12102(2)(B)'s "record of disability" definition. While Dr. Hunt was aware of Ms. Khalil's self-description of having asthma and sensitivity to fumes, Ms. Khalil never presented Dr. Hunt with documentation of her asthma and, as evidenced by the incident report, Dr. Hunt believed "there [was] no information in the employee's medical file to indicate that she has asthma." Mere knowledge of an impairment does not create a record of an impairment. Taylor v. Nimock's Oil Co., 214 F.3d 957, 961 (8th Cir. 2000). Here, Dr. Hunt's knowledge of Ms. Khalil's asthma alone – especially given that the description was Ms. Khalil's own description which may not necessarily have been medically accurate[4] – is insufficient to establish a record of an impairment.

c. "Regarded As" Having a Disability

In order to determine whether an employer "regarded" a plaintiff as disabled, Section 12102(2)(A) must be read in conjunction with Section 12102(2)(C) such that having a disability "includes being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual." See Gallagher, 268 F. Supp. 2d at 441

[4] The Court is not ascribing any nefarious or improper intention or act upon Plaintiff's part. Rather, the Court is merely allowing for the circumstance that laypersons may not be the most appropriate source of medical information in comparison to a medical professional. And the Court is not prepared to state that a layperson's self-described medical condition is routinely sufficient as a basis for a "record of impairment."

(citing Sutton, 527 U.S. at 489).[5] In the Third Circuit, a plaintiff may meet this definition in two ways: (1) in the absence of an actual impairment, the employer erroneously believes that the plaintiff has an impairment that substantially limits one or more major life activities; or (2) the plaintiff has a non-limiting impairment that the employer mistakenly believes substantially limits one or more major life activities. Tice, 247 F.3d at 514.[6] In either case, the definition of "substantially limits" remains the same as it does in other parts of the statute. Id. (citing Sutton, 527 U.S. at 489-90).

"[A]n inquiry into how an employee was 'regarded' is necessarily quite fact-specific, and all of the surrounding circumstances may be relevant in reaching a conclusion." Id. Mere *awareness* of a condition or impairment "alone is insufficient evidence to sustain a claim of

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[5] The "regarded as" definition of disability is applicable "if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on 'myth, fear or stereotype[.]" ' 29 C.F.R. Pt. 1630, App. § 1630.2(l). The Supreme Court reasoned that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987). Citing cosmetic disfigurements and diseases such as epilepsy and cancer, which some people irrationally fear as contagious, the Supreme Court reasoned that while a person may not have an impairment that "substantially limits" a major life activity, the negative perception by others regarding a perceived disability could be just as disabling. Id.

[6] The EEOC regulations provide three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

29 C.F.R. Pt. 1630, App. § 1630.2(1).

disability under the 'regarded as' prong." Gallagher, 268 F. Supp. 2d at 441. In Gallagher, the court held that the employer's "granting of extra consideration to [the plaintiff]" is likewise insufficient to demonstrate that the defendant employer "regarded" the plaintiff as disabled. Id. "An employer's decision to cooperate with an employee who is not 'disabled' under the ADA is not evidence of a perception of disability." Id. (citing Taylor v. Pathmark Stores, Inc., 17 F.3d 180, 190 (3d Cir. 1999)).

In Tice, the Court of Appeals held that there was insufficient evidence to demonstrate that the plaintiff was "regarded as" disabled where the employer requested a medical exam to determine the plaintiff's physical ability to perform his job as a bus driver. See Tice, 247 F.3d at 515. As that court explained, "[a] request for such an appropriately-tailored examination only establishes that the employer harbors *doubts* (not certainties) with respect to an employee's ability to perform a *particular* job. Doubts alone do not demonstrate that the employee was held in any particular regard . . . [and] inability to perform a particular job is not a disability within the meaning of the Act." Id. (citations omitted) (emphasis added). Indeed, with respect to the major life activity of working, the court noted that even if the employer "believed [the plaintiff] to be unable to drive a bus, such a regard would still not establish that [the employer] regarded him as *disabled*" because the evidence must show the employer regarded the plaintiff as unable to work "*in a broad class of jobs*." Id. at 516 (emphasis added).

Both Tice and Gallagher are on point. Here, as in Gallagher, Ms. Khalil cites her employer's awareness of her asthma and efforts to mitigate the effects of the paint fumes on that condition as evidence that Rohm and Haas "regarded" her as disabled. Specifically, Ms. Khalil points to the fact that Dr. Hunt moved Ms. Khalil into a temporary office away from the

renovations after the paint fumes caused Ms. Khalil to have an asthma attack.

It is undisputed that after Ms. Khalil's reaction to the paint fumes, Dr. Hunt sent an e-mail to Ms. Khalil on July 12, 2002 concerning "temporary office during renovations." The e-mail reaffirms the direction from the Medical Department that Ms. Khalil should avoid areas being painted; there is no reference to asthma in the document. (Khalil Dep. ex. 6 at D1058.) While Dr. Hunt likely was aware of Ms. Khalil's asthma (Bonner Dep. 157-58), Dr. Hunt testified that she did not view Ms. Khalil as ever having any *substantial* limitation in the ability to breathe or work. (Hunt Aff. ¶ 12.) Nothing in the record contradicts this testimony.

Compared to Tice, which emphasized that the employer must regard the employee as having an impairment *that substantially limits a major life activity*, and Gallagher, which held that mere awareness of an impairment is insufficient to establish that an employer "regarded" an employee as disabled, the evidence in the record here fails to establish that Ms. Khalil was "regarded as" disabled. Rohm and Haas's awareness of Ms. Khalil's asthma and the attempt to mitigate Ms. Khalil's reaction to the paint fumes is insufficient without more to establish that Rohm and Haas "regarded" Ms. Khalil as having an impairment that substantially limits a major life activity. See Benko v. Portage Area School Dist., 241 F. App'x 842, 847 (3d Cir. 2007) (holding that "neither [employer's] willingness to grant [plaintiff] a sabbatical for health reasons nor its response to the [insurance company's] request for information in connection with [plaintiff's] independent disability claim establish anything more than [employer's] awareness of [plaintiff's] impairment. Neither act conveys [employer's] assessment or perception of [plaintiff's] condition").

At most this evidence reflects the employer's recognition that under unusual or atypical

conditions Ms. Khalil would benefit from receiving a temporary – perhaps no more than relatively fleeting – accommodation. Specifically, there is nothing in the record to indicate that Dr. Hunt viewed Ms. Khalil as being substantially limited in her ability to breath or work *in general*; at most, Rohm and Haas apparently regarded Ms. Khalil as substantially limited in her ability to breath or work *when in the immediate vicinity of fresh paint fumes*. A limitation so narrow in scope does not qualify as a "substantial limitation" for purposes of defining disability, and thus does not qualify as a "regarded as" disability.

Ms. Khalil relies almost exclusively on a comment allegedly made by Dr. Hunt: "If you have asthma, you shouldn't be working in chemical company." (Khalil Dep. 265.) However, even if this comment is interpreted to demonstrate that Dr. Hunt viewed Ms. Khalil as substantially limited in her ability to work *in a chemical company*, it is still not enough to satisfy the high bar set by Tice. See Tice, 247 F.3d at 516 (noting that, with respect to the major life activity of working, even if the employer "believed [the plaintiff] to be unable to drive a bus, such a regard would still not establish that [the employer] regarded him as *disabled*" because the evidence must show the employer regarded the plaintiff as unable to work "*in a broad class of jobs*.") (emphasis added). "Work at a chemical company" or "work in close proximity to paint fumes" do not encompass a "broad class of jobs."

In summary, on this record, Ms. Khalil's satisfaction of the ADA's definition of disability is fragile, but there is nonetheless a genuine issue of fact as to whether her impairment substantially limits a major life activity. In contrast, there insufficient evidence in the record to demonstrate a *record* of an impairment, or that Dr. Hunt *regarded* Ms. Khalil as substantially limited with respect to a major life activity. Having determined that there is sufficient evidence

for a jury to find that Ms. Khalil was "disabled" within the meaning of subsection (A), the Court must then determine whether there is sufficient evidence of an adverse employment action.[7]

2. Adverse Employment Action

The final prong of the *prima facie* case requires evidence that the plaintiff "has suffered an otherwise adverse employment decision as a result of discrimination." Taylor, 184 F.3d at 306. The ADA prohibits discrimination against "qualified individuals with a disability" in regard to "advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Here, Ms. Khalil points to three employment decisions that allegedly resulted from discrimination: (a) Rohm and Haas allegedly denied Ms. Khalil a reasonable accommodation and failed to engage in an interactive process, i.e., Dr. Hunt's refusal to let Ms. Khalil wear a respirator (Khalil Dep. 260-61); (b) Rohm and Haas allegedly placed Ms. Khalil in a location in which it was impossible for her to perform her job, i.e., the temporary office (id. at 291-92, 300, 303-05); and (c) Rohm and Haas terminated Ms. Khalil's employment.[8]

a. Reasonable Accommodation and Interactive Dialogue

"An employer commits unlawful disability discrimination under the ADA if he/she 'does

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[7] As previously discussed, it is undisputed that Ms. Khalil was "qualified" for the job, thus satisfying the second prong of the *prima facie* case.

[8] The Complaint does not specifically allege Ms. Khalil's termination as an adverse employment action; rather, the Complaint states that Rohm and Haas "took adverse employment action against Plaintiff by imposing a mandatory restriction and/or accommodation on Plaintiff, by failing to engage in any interactive process and by refusing to allow her to access her work files so that she could adequately do her job." (Compl. ¶ 62.) However, as the Defendant has had adequate notice of this claim, there is no prejudice from a liberal reading of the Complaint to include a discriminatory discharge claim.

not make reasonable accommodations to the known physical or mental limitations of an [employee who is an] otherwise qualified individual with a disability.'" Conneen v. MBNA America Bank, 334 F.3d 318, 325 (3d Cir. 2003) (citing 42 U.S.C. § 12112(b)(5)(A)). A reasonable accommodation requires that steps be taken to "enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(ii). The term accommodation means:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1).

Once an employee has requested an accommodation, the EEOC regulations direct employers to engage in "a flexible, interactive process that involves both the employer and the [employee]" in order to determine "the appropriate reasonable accommodation." 29 C.F.R. Pt. § 1630, App. § 1630.9 at 359. Specifically, the EEOC regulations explain that

> [t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(3).

The employee must initiate the process, but "[t]he law does not require any formal mechanism or 'magic words' to notify an employer . . . that an employee needs an accommodation." Conneen, 334 F.3d at 332. In addition to demonstrating a request for an accommodation, the plaintiff must also demonstrate that "the employer did not make a good faith effort to assist the employee in seeking accommodation; and the employee could have been reasonably accommodated but for the employer's lack of good faith." Jones v. United Parcel Serv., 214 F.3d 402, 408 (3d Cir. 2002).

Here, Ms. Khalil's "interactive dialogue" claim is limited to Dr. Hunt's failure to discuss with her whether a respirator and/or the temporary office were an appropriate reasonable accommodation. (Khalil Dep. 303-305.) Ms. Khalil contends that her request to wear a respirator triggered Rohm and Haas's obligation to engage in the interactive process. See Jones, 214 F.3d at 406-08 (interactive dialogue obligation triggered by adequate notice to the employer of an ADA disability and by the employee's request for an accommodation). Dr. Hunt allegedly denied the respirator request (Khalil Dep. 303-305), and instead relocated Ms. Khalil to a temporary office where Ms. Khalil allegedly did not have the necessary materials to perform her job.

Ms. Khalil's deposition testimony, however, undercuts her own assertions. When asked if she ever asked anyone at Rohm and Haas for an accommodation, Ms. Khalil answered "No." (Khalil Dep. 126.) Even if Ms. Khalil inadvertently failed at her deposition to identify her request in the legal terminology of "accommodation," she went on to testify that she did not *need* a respirator. In response to Dr. Erinoff's assessment that "[t]here are currently no work restrictions or respirator use restrictions; however, . . . employee does not require a respirator for

her current job," Ms. Khalil stated:

> Whose decision is it to wear a respirator, the company's or mine? I have no restrictions. Why is someone at management level telling me what I can and cannot do if I have no restrictions. . . . I didn't need it [the respirator], but who says I can't wear it? If you don't need it, it's up to you to wear it or not.

(Khalil Dep. 253.)

Ms. Khalil's reasonable accommodation/interactive dialogue claim fails, primarily because Ms. Khalil testified that she did not *need* the respirator. While there may be a genuine issue of fact as to whether Dr. Hunt conducted an interactive discussion in good faith with respect to an accommodation for Ms. Khalil's paint fume sensitivity, there is no duty to provide an accommodation where an employee does not *need* the accommodation. The duty to provide an accommodation rests on the premise that an employee has a physical or mental impairment that requires an accommodation for the employee "to perform the essential functions of that position." See 29 C.F.R. § 1630.2(o)(1)(ii). Moreover, there is no duty to provide a particular or precise accommodation requested by an employee. Jack Jay v. Internet Wagner, Inc., 23 F.3d 1014, 1017 (7th Cir. 2000); see also Chatman v. Greenlee Textron, Inc., 2001 WL 1183296, at *1 (N.D. Ill. Oct. 4, 2001) (no ADA duty to give the employee a requested respirator where the employer transferred the employee to an area where a respirator was not needed). Thus, Ms. Khalil's discrimination claim cannot proceed based on this alleged adverse employment action.

b. The Temporary Office

Second, Ms. Khalil alleges that her placement in the temporary office was a discriminatory adverse action because the relocation prevented her from performing her job duties. (Khalil Dep. 303-305.) Following Ms. Kahlil's paint fume reaction in July 2002, in

response to the Rohm and Haas nurse's recommendation, Dr. Hunt assigned Ms. Khalil to a temporary office at the other end of the hall in order to move her away from the vicinity of the offending paint fumes.

It is undisputed that Ms. Khalil's compensation, benefits, job title and job level did not change while she was situated in the temporary office. (Facts ¶ 56; Khalil Dep. 298-99.) The temporary office was located in the same building as Ms. Khalil's regular office; it was merely at the other end of the hall. (Facts ¶ 53.) It is also undisputed that Ms. Khalil's computer was moved to the temporary office. (Khalil Dep. 295.) Ms. Khalil cannot identify any specific files or documents that she did not have while in the temporary office, but she maintains that she did not have the materials she needed to do her job. (Khalil Dep. 297.) However, Ms. Khalil does not believe that her temporary office caused her to perform unsatisfactorily because despite working with "limited ability" due to the location of the temporary office, she "did the best [she] could," and "delivered on what [Dr. Hunt] asked to the best of [her] ability." (Khalil Dep. 301-02.)

Rohm and Haas responds that at Ms. Khalil's request, Dr. Hunt and an administrative assistant brought materials from Ms. Khalil's regular office to the temporary office. (Hunt Aff. ¶ 9; Hunt Dep. 222-24.) Dr. Hunt testified that she does not know of any request by Ms. Khalil for office materials that was not met. (Id.)

There is here a factual dispute as to whether Ms. Khalil's assignment to the temporary office prevented her from performing her work. If Dr. Hunt refused to get Ms. Khalil's materials for her (while at the same time allegedly denying Ms. Khalil permission to wear a respirator), then the assignment to the temporary office could be viewed as an adverse employment action.

If, however, Ms. Khalil was not denied access to her materials, then the office change alone does not as a matter of law rise to the level of an adverse employment action. See Shaner, 204 F.3d at 506 (office relocation and uncomfortable office temperature did not rise to level of adverse action for ADA discrimination claim); Tyler, 245 F.3d at 972 (transfer to a different plant not an adverse employment action under ADA as compensation remained the same); Hunter v. Rowan University, 2007 WL 1038760, at *5 (D.N.J. Mar. 30, 2007) (transfer of office not an adverse employment action as title and compensation remained the same).

Because the effect of Ms. Khalil's relocation to the temporary office is a disputed issue of fact, this alleged adverse employment action satisfies the *prima facie* case and constitutes a viable basis for Ms. Khalil's employment discrimination claim to proceed past the summary judgment motion.

c. Ms. Khalil's Discharge

Although Ms. Khalil did not explicitly so plead in the Complaint, she now asserts that her discharge was an additional "adverse employment action" resulting from discrimination. Termination, of course, constitutes an adverse employment action within the meaning of the ADA. See Barclay v. AMTRAK, 435 F. Supp. 2d 438 (E.D. Pa. 2006). Although this basis for her discrimination claim was not explicitly pleaded, under the circumstances presented here, Rohm and Haas will not be prejudiced if the Complaint is read to encompass a claim for discriminatory discharge. Thus, Ms. Khalil's discharge constitutes a second adverse employment action upon which she may base her discrimination claim.

In sum, Ms. Khalil has succeeded in establishing a *prima facie* case because there is sufficient evidence in the record for a reasonable jury to find that she was "disabled" within the

meaning of Section 12102(2)(A) of the ADA, that she was qualified for her position, which Rohm and Haas does not dispute, and that she was subjected to adverse employment actions.

B. Non-discriminatory Reason

Once Ms. Khalil has established a *prima facie* case, the burden shifts to Rohm and Haas to articulate a legitimate, non-discriminatory reason for the adverse employment action. Jones, 198 F.3d at 410. Here, as discussed above, the only viable alleged adverse employment actions are (1) the transfer to a temporary office, and (2) Ms. Khalil's discharge.

The defendant's burden is "one of production, not persuasion; it 'can involve no credibility assessment.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)). The defendant can satisfy its burden by presenting evidence sufficient to conclude that there was a nondiscriminatory reason for the plaintiff's discharge. Fuentes, 32 F.3d at 763 (citing Hicks, 509 U.S. at 508). Our Court of Appeals has described this burden as "relatively light" because the defendant need not prove that its proffered reason actually motivated its decision. Fuentes, 32 F.3d at 763 (citing Burdine, 450 U.S. at 253).

1. The Temporary Office

On July 10, 2002, following Ms. Khalil's paint fume reaction on July 9, 2002, a Rohm and Haas nurse signed a document directing Ms. Khalil to "avoid areas being painted." (Khalil Dep. 223, ex. 20 at D716.) Rohm and Haas contends that Dr. Hunt transferred Ms. Khalil to the temporary office pursuant to the occupational nurse's recommendation, and the move was intended to enable Ms. Khalil to work while the renovations were being conducted. This proffered reason is adequately supported by the evidence in the record and suffices to satisfy

Rohm and Haas's burden of production.

2. Ms. Khalil's Discharge

Rohm and Haas contends that Ms. Khail was discharged for performance reasons. Ms. Khalil worked on various assignments from June 2001 through August 2002. The main concern regarding her performance appears to be the sheer lack of work produced, as well as perceived difficulties with attitude and interpersonal relationships.

From June 2001 to October 2001, Ms. Khalil worked with Dr. Bonner on a joint initiative between Rohm and Haas and the University of Mississippi. (Khalil Dep. 405-09, 691; Bowie Aff. ¶ 3.) Ms. Khalil does not remember submitting any written work product regarding this initiative. (Khalil Dep. 405-09, 691.) Dr. Bonner also sent Ms. Khalil to a course on acrylics in order to help bring her up to speed on the "core chemistry technology of the company." (Bonner Dep. 75, 77.)

From October 2001 through January 2002, Ms. Khalil was assigned to the Bristol Digital Imaging engineer team. During that assignment, conflicts arose between Ms. Khalil and other members of the team, including the Digital Imaging Manager, Dr. George Lien, and Bristol engineers Vince Farozic and Jeanine Hurry. (Facts ¶¶ 18-20.) Dr. Lien, Mr. Farozic and Ms. Hurry were all critical of Ms. Khalil's attitude and work performance. (Id. at ¶¶ 18, 19.)

From January 2002 through April 2002, Ms. Khalil was assigned to a project with Aspen Process Control. (Bonner Dep. 206.) This project ended when the plant sponsoring the project changed strategy and withdrew support. (Id. at 307-08.) At some point in 2002, Ms. Khalil also worked on an exploratory Rice University collaboration project until Dr. Hunt removed her from the project. Ms. Khalil does not remember submitting any technical report or other work product

with respect to her work on this project. (Facts at ¶ 16.) Indeed, between her January 18, 2002 return to the Spring House site and the beginning of her External Funding assignment in April, Ms. Khalil cannot remember delivering any work product to anyone at Rohm and Haas. (Id. at ¶ 15.)

From April 2002 through August 2002, Ms. Khalil worked on an External Funding assignment. On May 21, 2002, Ms. Khalil prepared for Dr. Hunt a list entitled "Current projects/activities." (Facts ¶ 33.) One of the projects was a "cost estimation from Adam Hsu," which Dr. Bonner had asked Mr. Hsu to assign to Ms. Khalil. (Id.) Ms. Khalil did not know how to do a cost estimation but, following the advice of Dr. Bonner, identified another employee, Leo Klawaiter, to do the cost estimation, which he did. (Id.) Mr. Hsu's feedback, which Ms. Khalil views as "accurate," states that Ms. Khalil's "contribution to the project [was] that she identified Mr. Leo Klawaiter of CED to do the cost estimation" and "acted as a group leader." (Id. at ¶ 36.)

Although Ms. Khalil understood that a "deliverable" in her External Funding assignments was a "grant application," Ms. Khalil never prepared a grant proposal during her employment at Rohm and Haas. (Id. at ¶ 39.) Dr. Hunt informed Ms. Khalil that she needed to reach her external funding target (id. at 40), and to help Ms. Khalil focus, identified the U.S. Department of Energy as a promising external funding source (id. at ¶ 41). Ms. Khalil did not work on any other potential sources for external funding. (Id.)

At some point in the spring of 2002 following the Bristol project, Dr. Bonner arranged to

have Ms. Khalil meet with a licensed psychologist for "performance coaching." (Id. at ¶ 20.)[9] The performance coaching included a "360 degree review," with solicited feedback from Dr. Lein, Mr. Farosic and Ms. Hurry, as well as others with whom Ms. Khalil had worked, including Mr. Brown, who headed the rotational program. (Id. at ¶ 21.) The reviews were uniformly negative but, according to the psychologist, Judith Klimoff, this was to be expected because the feedback was intended to focus on areas for improvement. (Id. at ¶ 21.) The extent of Ms. Khalil's participation in the performance coaching and its success is disputed.[10]

On July 31, 2002, Ms. Khalil met with Dr. Hunt and Ms. Klimoff to discuss and address the developmental action plan. (Khalil Dep. 476; Facts ¶ 29.) During the meeting, Ms. Khalil stated that she understood the 360-degree feedback, but after the meeting, Dr. Hunt informed Ms. Khalil that she had not taken ownership of the plan and was not committed to working on the behavioral issues identified in the plan. (Facts ¶ 29.) Dr. Hunt memorialized this assessment in

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[9] Dr. Bonner formally described the performance coaching as follows:

> This sort of program is intended for employees . . . who have exhibited behaviors that impeded effectiveness. The structure of the program is . . . to provide a diagnosis/description of the behaviors with sufficient precision that a corrective action plan can be created. The corrective action plan is to be created in collaboration with the employees' supervisor and with the industrial psychologist. Then the employee is asked [to] show progress against the plan, monitored by her supervisor.

(Def. Ex. 24.)

[10] Ms. Klimoff created a "developmental action plan," but she and Dr. Hunt felt that Ms. Khalil never "took ownership" of the plan – that is, "acknowledging the identified performance problems as real and genuinely committing to correct the problems and improve." (Klimoff Dep. 68-69, 76, 104-05, 125-27, 134; Hunt Dep. 265, 282-83.) Ms. Khalil denies that she did not "take ownership" of the plan. (Facts ¶ 25.)

an August 9, 2002 memorandum entitled "Review of July 31st Coaching/Feedback Meeting." (Id. at ¶ 30.) In an August 12, 2002 e-mail to Ms. Khalil, Dr. Hunt again addressed a number of Ms. Khalil's performance issues, including the developmental action plan and the undesirable behaviors identified in it. (Id. at ¶ 31.) On August 14, 2002, Ms. Khalil responded by submitting a developmental action plan with a cover memorandum. (Id. at ¶ 32; Khalil Dep. ex. 42.) Other than the removal of the word "draft," the plan was the same as the plan submitted in July 2002. (Id.) As with the July 2002 draft plan, Ms. Khalil omitted her name from the action plan and included a disclaimer in which she rationalized and/or disagreed with four of the five behaviors listed in the plan. (Id.)[11] On September 27, 2002, by decision of Dr. Hunt, Rohm and Haas formally terminated Ms. Khalil's employment. (Khalil Dep. 28; Bowie Affidavit ¶ 7.)

Ms. Khalil's documented performance and attitude issues, though disputed, evince a legitimate, non-discriminatory reason for Ms. Khalil's discharge and suffice to satisfy Rohm and Haas's relatively light burden of production.

C. Evidence of Pretext

Once a defendant establishes a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff must adduce evidence that "casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication or . . . infer that discrimination was more likely than not a

[11] In addition to viewing Ms. Khalil's performance as poor (see Khalil Dep. 588, ex. 54), Dr. Hunt also had concerns with Ms. Khalil's travel expenses (Khalil Dep. ex. 55; Hunt Dep. 64-66, 398-99, 404, 408-09). However, any such misconduct is irrelevant because issues involving Ms. Khalil's expense reports were not a basis for Ms. Khalil's termination. (Bowie Dep. 153-54.) At the termination meeting on September 27, 2002, Dr. Hunt told Ms. Khalil that she was being terminated because she was not performing up to the expectations for a level 10 engineer. (Khalil Dep. 234-35; Hunt Dep. 460; Bowie Dep. 181.)

motivating or determinative cause of the adverse employment action." Fuentes, 32 F.3d at 762. Thus, the plaintiff must *either* (1) discredit the proffered reasons, *or* (2) adduce evidence that discrimination was more likely than not a motivating or determinative cause. Id. at 764.

To discredit the employer's proffered reason, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a fact finder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] nondiscriminatory reasons.'" Id. at 764-65 (citations omitted). Ms. Khalil cannot satisfy this burden merely by showing that Dr. Hunt's decision was "wrong or mistaken" because the focus is on "whether discriminatory animus motived the employer, not whether the employer is wise, shrewd, prudent or competent." Id. at 765 (citations omitted).

Ms. Khalil relies primarily on the testimony of Dr. Bonner to suggest Rohm and Haas's pretext. With respect to all of Ms. Khalil's assignments, Dr. Bonner testified as to his view that Ms. Khalil's performance was more than satisfactory, and any problems that arose were not her fault. For example, according to Dr. Bonner, Ms. Khalil's concerns about the design of an emissions vent for the Bristol project, which the other team members disputed, ultimately proved to be correct. (Bonner Dep. 82-83.) Dr. Bonner also explained that Ms. Khalil was removed from the Bristol project for health reasons, not performance reasons, and that the Aspen project was stopped due to a change in strategy. (Bonner Dep. 98-99, 307.) Indeed, according to Dr. Bonner, Ms. Khalil did not produce any written work product "[b]ecause, in effect, each of the project assignments was stopped prematurely" and thus, through no fault of her own, Ms. Khalil was not given the opportunity to produce written work product. (Bonner Dep. 307.)

Dr. Bonner also presents a different view on the nature of Ms. Khalil's work on the External Funding assignment. During the External Funding assignment, Ms. Khalil chaired a Department of Energy "Steam Best Practices Training" subcommittee. (Facts ¶ 44.) While Ms. Khalil received positive feedback from Dr. Bonner for her work on the subcommittee, Dr. Hunt failed to see any results. When Dr. Hunt asked Ms. Khalil to justify her role on the subcommittee, Ms. Khalil responded that it was a networking opportunity, but Ms. Khalil cannot explain how the subcommittee connected to any Rohm and Haas project. (Id.)

Finally, with respect to the performance coaching, Dr. Bonner viewed the problem as originating with the attitude of the Rohm and Haas scientists, not Ms. Khalil. According to Dr. Bonner, the goal of the "performance coaching" was meant in part to address what he perceived to be "a resistance by people in the general culture of the research unit, research division, which made it difficult for someone with [Ms. Khalil's] background to be accepted by them." (Id. at 118-19.)

In addition to Dr. Bonner's positive evaluations of Ms. Khalil's performance, which tend to discredit Dr. Hunt's assessment, as evidence of discriminatory animus Ms. Khalil also points to a comment allegedly made by Dr. Hunt to Ms. Khalil: "If you have asthma, you shouldn't be working in a chemical company." (Khalil Dep. 265.)

Although there is substantial evidence of Ms. Khalil's perceived performance deficiencies, Dr. Bonner's contrary evaluation and Dr. Hunt's alleged comment are sufficient to raise a genuine issue of fact as to pretext.[12]

[12] Rohm and Haas mistakenly asserts that Dr. Bonner's assessment is irrelevant because (1) Ms. Khalil never worked on a project directly for Dr. Bonner (Bonner Dep. 201); (2) Ms. Khalil never submitted any written work product to Dr. Bonner (Khalil Dep. 523-24, 700;

Thus, the Court will deny the Motion for Summary Judgment with respect to Ms. Khalil's discrimination claim, but limits that claim to her alleged physical impairment, see 42 U.S.C. § 12102(2)(A), and to the adverse employment actions involving the temporary office and Ms. Khalil's discharge. The Motion will be granted with respect to any discrimination claim based on an alleged "record of disability" or on Ms. Khalil's being "regarded as" disabled, as well as with respect to any claim based on the alleged denial of a reasonable accommodation and/or failure to engage in an interactive dialogue.

Bonner Dep. 279); (3) Dr. Bonner was not a mentor for Ms. Khalil, given that Dr. Bonner asked Dr. Hunt to assume that role in April 2002 (Bonner Dep. 158; Hunt Dep. 20-22, 307); (4) by May 2002, Dr. Bonner had assigned Ms. Khalil to work in External Funding and from that point forward Dr. Hunt had final authority over Ms. Khalil (Khalil Dep. 33-34, 553, 591, 594, ex. 51; Bonner Dep. 161-62; Hunt Dep. 20-22, 80, 307); and (5) Dr. Bonner ended his Rohm and Haas employment on July 13, 2002, over two months prior to Ms. Khalil's termination (Bonner Dep. 268-69, 292-94).

The fact that Dr. Bonner did not directly supervise Ms. Khalil, or that he asked Dr. Hunt to assume a mentor role for Ms. Khalil, does not detract from the relevance of his opinion as to Ms. Khalil's work. Until his departure in July 2002, Dr. Bonner remained in charge overall of the rotational program and, therefore, in charge of rotational engineers like Ms. Khalil. (Facts ¶ 6.) Indeed, Dr. Bonner testified that he remained in charge of performance appraisals. (Bonner Dep. 41.) Rohm and Haas cites Frost v. Petsmart, 2007 WL 602990, at *7 (E.D. Pa. Feb. 26, 2007), for the proposition that "it is the decisionmaker's perceptions that are relevant to the analysis of pretext." (Def. Reply 4.) This statement from Frost is taken out of context, however. Both this Court and the Court of Appeals have explained that *in contrast to the plaintiff's* view of his performance, the view of the decisionmakers is exclusively relevant. In other words, "[t]he fact that an employee disagrees with an employer's evaluation of him does not prove pretext." Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991), overruled in part on other grounds, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). This is not to say that the *contemporaneous* view of other supervisors is irrelevant to establishing pretext. While other or former supervisors may not have been the ultimate or final "decisionmaker" with respect to the adverse employment action at issue, their views as to the plaintiff's performance are relevant to demonstrate any "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons." See Fuentes, 32 F.3d at 764-65.

Rohm and Haas is correct, however, that Dr. Bonner's testimony regarding Ms. Khalil's access to her materials while located in the temporary office is irrelevant. Dr. Bonner left Rohm and Haas shortly after Ms. Khalil moved to the temporary office, and thus Dr. Bonner has no personal knowledge as to whether Ms. Khalil had access to her materials.

III. Retaliation (Counts II and V)

The ADA prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any matter in an investigation, proceeding, or hearing under this Act." 42 U.S.C. § 12203(a). The burden-shifting scheme established in McDonnell Douglas applies with equal force to retaliation claims. Shaner, 204 F.3d at 500-01. If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to produce evidence that the adverse employment action was taken for a legitimate, non-retaliatory reason. Id. If the employer succeeds, the burden then shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the employer's proffered reason was merely pretext for unlawful retaliation. Id. at 501.

A. *Prima Facie* Case

"To establish a *prima facie* case of retaliation, a plaintiff must show (1) a protected employee activity, (2) adverse employment action by the employer after or contemporaneous with the employee's protected activity, and (3) a casual connection between the employee's protected activity and the employer's adverse action." Shaner, 204 F.3d at 500; Gallagher, 268 F. Supp. 2d at 442 (citing Shellenberger v. Summit Bancorp, Inc., 2003 WL 187197 (3d Cir. Jan. 23, 2003)).

1. Protected Activity

The protected activity must relate to conduct "made unlawful by [the ADA]." See, e.g., Barcher v. CSC Distribution Servs., 68 F.3d 694, 701-02 (3d Cir. 1995) (rejecting ADA retaliation claim on the ground that a "general complaint of unfair treatment does not translate

into a charge of illegal age discrimination" and, accordingly, a letter complaining generally of unfair treatment "does not constitute the requisite 'protected conduct' for a *prima facie* case of retaliation").

Here, Ms. Khalil alleges that she was terminated in retaliation for (1) filing a complaint with the PHRC and the EEOC; (2) "informing Defendant via email dated August 13, 2002 that she felt she [was] being treated unfairly"; and (3) requesting an accommodation for her asthma. (Compl. ¶ 67; Facts ¶ 88.)

First, an EEOC or PHRA complaint is clearly protected activity.[13] The retaliation claim related to these administrative complaints thus turns on whether any adverse employment action occurred after the filing of the complaints, and whether there is a causal connection between Ms. Khalil's discharge and the protected activity.

In addition, for purposes of presenting some "protected activity," Ms. Khalil points to her August 13, 2002 e-mail to Dr. Hunt, which states in reference to Ms. Khalil's reaction to the paint, "I feel that because of my safety incident, I am treated unfairly." (Khalil Dep. ex. 22.) Ms. Khalil also claims that on one occasion after August 13, 2002, she told Dr. Hunt that her "rights" were being violated and that she was "not being treated fairly by being placed in this [temporary] office." (Khalil Dep. 457-58, 758-59.) In contrast to the EEOC and PHRA filings, in the Third Circuit, these general complaints of unfairness or civil rights violations do not constitute "protected activity." For example, in Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006), the plaintiff filed a complaint with the EEOC allleging that the defendant "discriminated against

[13] A plaintiff need not be "disabled" within the meaning of the ADA to bring a claim for retaliation under ADA. Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 759 n.2 (3d Cir. 2004).

me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." Id. at 263. When the plaintiff was discharged less than four months later, he brought a retaliation claim under Title VII. Explaining that the EEOC complaint presented only "vague allegations of 'civil rights' violations," and did not specifically identify anything made unlawful by Title VII, the Court of Appeals focused upon whether the underlying "whistleblowing" complaints amounted to valid "protected activities" and affirmed the summary judgment dismissal of the retaliation claim for failure to establish the *prima facie* element of protected activity. Id. at 267-68. See also Barber, 68 F.3d at 702 (general complaint of unfair treatment does not constitute "protected conduct").

Finally, Ms. Khalil also asserts that her request for an accommodation (i.e., to wear a respirator) constitutes protected activity.[14] Requesting an accommodation under the ADA is a protected employee activity and a plaintiff need not show that she is "disabled" within the meaning of the ADA to pursue a retaliation claim based on a request for accommodation. Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 759 n.2 (3d Cir. 2004). "[A]s opposed to showing disability, a plaintiff need only show that she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested." Id. However, as discussed above, Ms. Khalil has admitted that she never asked anyone at Rohm and Haas for an accommodation, and that she did not in fact *need* a respirator. (Khalil Dep. 126, 253.) Thus, there is insufficient evidence for a reasonable jury to find that Ms. Khalil's request

[14] Rohm and Haas notes that Ms. Khalil did not include her request for a respirator in the Complaint as a "protected activity," (Compl. ¶ 67) and, therefore, should be precluded from making that argument now. Because this basis for Ms. Khalil's retaliation claim fails, the Court need not address the issue of whether the claim was properly raised in the pleadings.

was "reasonable" and in "good faith" and, thus, a "protected activity."

In sum, the filing of the administrative complaints constitutes the only viable allegation of protected activity for purposes of Ms. Khalil's retaliation claim.

2. Adverse Action After or Contemporaneous With the Protected Activity

Ms. Khalil went to the EEOC on August 30, 2002 in an attempt to file a complaint, but no one at the EEOC was available to talk to her. (Facts ¶ 89.) Ms. Khalil then went to the PHRC and filed a complaint against Rohm and Haas, which was dual-filed with the EEOC. (Id.) Ms. Khalil began a vacation in California the following day on August 31, 2002. (Id.) She was scheduled to return to work during the week of September 9, 2002, but ultimately did not return until September 23, 2002 due to a surfing accident that damaged her teeth. (Id.) She was officially terminated on September 27, 2002.

While Ms. Khalil does not have any evidence as to the date on which the decision to terminate her employment was made, she does point to a September 13, 2002 e-mail from Dr. Hunt addressing ongoing work-related business. (See 9/13/02 e-mail, Pl. Response Ex. K.)[15] It is undisputed that the PHRC mailed notice of the administrative complaints on September 18, 2002. (Facts ¶ 94.) By September 23, 2002, Dr. Hunt, by her own admission, was aware of those complaints. (Hunt Dep. 461-62.)

Rohm and Haas asserts that Dr. Hunt made the decision to terminate Ms. Khalil by the end of August 2002, and intended to implement that decision before Ms. Khalil left for her

[15] According to Dr. Hunt, this e-mail concerned time cards and was sent to both Ms. Khalil and Dr. Hunt's secretary. Dr. Hunt testified that she included Ms. Khalil on the e-mail because she did not want her secretary to know about the decision to terminate Ms. Khalil. (Hunt Dep. 464-65, Pl. Response Ex. G.)

planned vacation. (Hunt Dep. 416, 425, 451.) The termination purportedly was delayed because the Spring House Human Resources Manager, Ms. Bowie, did not complete the required administrative steps and standard protocol for terminations until September 6, 2002. (Hunt Dep. 442-46, 450, 475-76; Bowie Dep. 118-19, 155; Bowie Aff. ¶ 5.) Rohm and Haas contends that the original planned termination date for Ms. Khalil was September 10, 2002 because that was the date "everybody could be there." (Hunt Dep. 416, 451; Bowie Dep. 163; Bowie Aff. ¶ 7.)

Dr. Hunt did not send any e-mails or create any computer files with regard to her plans to terminate Ms. Khalil. (Hunt Dep. 450.) Ms. Bowie, however, did generate a document related to a September 10, 2002 termination meeting, but it is not clear when the document was created. (See Bowie Aff. ex. 3.)

The normal Rohm and Haas practice in 2002 was to deactivate the computer access of a terminated employee on the date of termination. (Bowie Dep. 188.) Ms. Bowie asked for Ms. Khalil's computer access to be terminated on September 10, 2002, but Ms. Khalil's delayed return to work resulted in deactivation of Ms. Khalil's computer access on September 23, 2002. (Id. at 185-86, 188, ex. 10.) When Ms. Khalil arrived at work on September 23, 2002, the Spring House Security Director told her that she was being placed on administrative leave and was to return the next day. (Facts ¶ 107; Khalil Dep. 379-80.)

The termination meeting began the following day, on September 24, 2002, but Ms. Khalil requested that the meeting be rescheduled so that she could bring a witness. (Facts ¶ 108; Khalil Dep. 381-84.) Rohm and Haas complied with this request and the meeting was rescheduled to September 27, 2002, which is the undisputed official date of Ms. Khalil's termination. The separation agreement was dated September 10, 2002, which Ms. Khalil objected to, but Dr. Hunt

allegedly refused to change the date. (Khalil Dep. 286-87.)

In sum, there is a genuine issue of fact as to when Dr. Hunt made the *decision* to terminate Ms. Khalil, but it is undisputed that Ms. Khalil's official termination occurred after Rohm and Haas received notice of the administrative complaints and after Dr. Hunt became aware of those complaints on September 23, 2002. (Hunt Dep. 461-62.) Thus, there is sufficient evidence for Ms. Khalil to satisfy this prong of the *prima facie* case.

3. Causal Connection Between the Protected Activity and the Adverse Action

To demonstrate a causal connection, Ms. Khalil relies on the temporal proximity between her discharge and the filing of the administrative complaints. "[W]hen only a short period of time separates an aggrieved employee's protected conduct and an adverse employment decision, such temporal proximity may provide an evidentiary basis from which an inference of retaliation can be drawn." Fasold v. Justice, 409 F.3d 178, 190 (3d Cir. 2005) (holding that three-month period between protected activity and adverse action raises an inference of retaliation). Here, asserts Ms. Khalil, Rohm and Haas shut off her computer access and denied her access to the premises on the exact date it received the charge of discrimination, and then attempted to hold a termination meeting the following day.

Rohm and Haas responds that Dr. Hunt was not aware of the PHRC complaint until September 23, 2002 (Hunt Dep. 461-62), by which time the termination decision had already been made and the termination meeting already scheduled. (Hunt Dep. 460-61; Hunt Aff. ¶ 13.)

The evidence in the record supporting a causal connection between the discharge and the protected activity is certainly thin. Nonetheless, given the close temporal proximity, there is sufficient evidence to satisfy the relatively light burden posed by the *prima facie* case. In sum,

Ms. Khalil has succeeded in producing the minimal amount of evidence required to establish a *prima facie* retaliation case. Accordingly, the burden then shifts to Rohm and Haas to produce evidence of a legitimate, non-retaliatory reason for Ms. Khalil's discharge.

B. Non-retaliatory Reason

Rohm and Haas proffers the same performance-based reasons for Ms. Khalil's discharge that it asserts with respect to Ms. Khalil's discrimination claim. As previously discussed, there is ample evidence of Ms. Khalil's performance deficiencies to satisfy Rohm and Haas's relatively light burden of production.

C. Pretext

As evidence that Rohm and Haas's proffered reasons are merely pretext for retaliation, Ms. Khalil again relies on Dr. Bonner's testimony with respect to her performance, and Dr. Hunt's alleged comment about people with asthma working in a chemical company, as well as the temporal proximity argument. As previously discussed, there is sufficient evidence in the record to raise a genuine issue of fact as to pretext.

Viewing the facts in the light most favorable to Ms. Khalil, there is sufficient evidence in the record for Ms. Khalil to proceed with a retaliation claim.

IV. Disclosure of Confidential Medical Records

At the oral argument held on January 25, 2008, Ms. Khalil's counsel represented to the Court that Ms. Khalil is no longer pursuing a claim based on the alleged disclosure of confidential medical information. (See Tr. 1/25/08 at 5.) Accordingly, summary judgment as to this claim is unopposed.

CONCLUSION

The Motion for Summary Judgment is denied with respect to Ms. Khalil's discrimination claim, but that claim is limited to the physical impairment definition of disability, see 42 U.S.C. § 12102(2)(A), and to the adverse employment actions involving the temporary office and Ms. Khalil's discharge. The Motion is granted with respect to any discrimination claim based on a "record of disability," or Ms. Khalil's being "regarded as" disabled, and with respect to any discrimination claim based on the alleged denial of a reasonable accommodation and/or failure to engage in an interactive dialogue. Summary judgment is denied with respect to Ms. Khalil's retaliation claim, but that claim is limited to the protected activity of the filing administrative complaints. The Motion is granted with respect to any retaliation claim based on any other alleged activity. Finally, summary judgment is granted with respect to the disclosure of confidential medical records claim.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA KHALIL,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
ROHM AND HAAS COMPANY,	**:**	
Defendant	**:**	**NO. 05-3396**

ORDER

AND NOW, this 11th day of February, 2008, upon consideration of the Defendant's Motion for Summary Judgment (Docket No. 36), the Plaintiff's response thereto (Docket Nos. 43-47) and the Defendant's reply (Docket No. 55), it is hereby ORDERED that:

1. With respect to the Plaintiff's discrimination and retaliation claims, the Motion is GRANTED IN PART AND DENIED IN PART as outlined in the accompanying Memorandum; and

2. With respect to the Plaintiff's disclosure of confidential medical information claim, the Motion is GRANTED and that claim is dismissed.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge